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IN THE

Supreme Court of the United States

October Term, 1963

No. 422

MILTON ARONSON, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR REHEARING.

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Jurisdictional Statement.

This is a Petition for Rehearing upon the order of this Court dated November 18, 1963 denying the Petition for Writ of Certiorari.

Grounds for Rehearing.

I.

This Court Has Already Granted Certiorari in a Case Involving the Construction of Rule 21(b) Rules of Criminal Procedure and Change of Venue Which Is Still Pending (Platt v. Minnesota Mining and Manufacturing Company, 347 U.S. 825). The Question in That Case Is Precisely That Presented by This Petitioner in His Petition for Writ of Certiorari.

II.

There Is Additionally Now Pending Before This Court a Petition for Writ of Certiorari Involving the Same Question (Boren v. McClean, Filed November 29, 1963).

III.

The Existence of the Above Two Petitions (the Existence of Which Petitioner Had no Actual Knowledge Until November 29, 1963) Constitute Intervening Circumstances of Substantial and Controlling Effect and Compel Reconsideration of the Original Petition for Writ of Certiorari.

Argument in Support of Petition for Rehearing.

The *Boren* Petition presents facts relating to venue which are amazingly similar to those of Petitioner *Hanson*. *Boren*, however, comes before this Court in a pre-trial posture, as does the *Minnesota* matter.

Petitioner herein, a California resident, claims prejudice, after conviction, from the denial of his second motion for change of venue made prior to trial, after severance of trial was had from other defendants who resided in New York. [The earlier motion was denied on the basis of convenience to the other defendants (see Petition for Writ of Certiorari, page 11)]. The corporation involved in the instant case was a Nevada corporation. The overt acts of Petitioner took place in California and Nevada. Others' overt acts took place in New York and thus gave the Government a choice of venue (18 U. S. C. 371 (a)) most convenient to itself and in furtherance of an apparent policy of the Government and the Securities and Exchange Commission to have Security Act violations prosecuted in the

Southern District of New York, irrespective of any other considerations (see *infra*).

In the *Minnesota* case an indictment was returned in the Eastern District of Illinois. Defendant made application for change of venue to Minnesota. This application was denied. A Petition for Writ of Mandate was granted by the Court of Appeals for the Seventh Circuit (*Minnesota Mining & Mfg. Co. v. Platt*, 313 F. 2d 309) directing Chief Justice Platt of the District of Illinois to transfer the matter to Minnesota pursuant to Rule 21(b) of the Criminal Rules of Procedure. The Government petitioned for, and was granted Certiorari upon the following question: "Is a Federal District Judge, in determining whether venue transfer would be in 'interest of justice' under §21(b) of the Federal Rules of Criminal Procedure required to give heavy or dispositive weight to the fact that a proposed transferee District is the home District of the corporate defendant?"

In *Boren* the procedural facts are the same as *Minnesota* except the situations and petitioners are reversed, *i.e.*, upon the denial of a motion for change of venue from New York to Texas, defendant *Boren* (after severance granted from co-defendants), applied for and was denied a Petition for Writ of Mandate by the Court of Appeals for the Second Circuit (October 31, 1963, Docket 28, 541). The District Court in *Boren* cites the Court of Appeals' decision in the instant case as one of its authorities for the denial of the Rule 21(b) motion (see *Boren v. Mulligan*, Petition for Writ of Certiorari, Appendix "B", pages 32-33).

The *Boren* Petition raises three interwoven questions concerning the denial of the Motion for Change of Ven-

ue. (1) Whether "heavy" and "dispositive" weight should be given to the motion where the hardship on the defendant is great; (2) Whether a trial judge may deny such a motion on the grounds that the case would have to be tried twice; and (3) Whether there was an abuse of discretion in denying the motion where the court had granted a severance of trials from four other defendants.

The *Boren* Petition (pages 16-18) cites and distinguishes this Petitioner's rejected claim of prejudice on the basis that *Aronson* involved a post-conviction remedy which the Court of Appeals for the Second Circuit considered in the light of a very peculiar construction of the Rules of Appellate Review. "Whether the convenience to the defendants would have been better served by a California venue or whether expense to the defendants would have been avoided thereby, a question which now must be answered in the light of a paramount Appellate question: Were these defendants deprived of a fair trial as the result of the denial? . . . There was no abuse of discretion. Furthermore, an examination of the record discloses that no prejudice to these defendants resulted from a New York trial." (*United States v. Aronson*, 319 F. 2d 48, 52).

As pointed out in *Boren's* Petition (p. 17):

> ". . . the closest examination of the record cannot reveal the testimony of the witnesses, character and otherwise, whom the defendant's means could not permit to be brought to New York from Texas. . . ."

Thus this Court has before it three cases involving interpretation of Rule 21(b) in the light of constitutional and public policy (due process) questions relat-

ing to the rights of defendants, individual and corporate, to have a trial in their own vicinages (Constitution, Article III, §2 Clause 3; VIth Amendment) as compared to "convenience" and "policy" considerations raised by the Government in its office as prosecutor. . . . The *Boren* petition (p. 16) points out a "policy" by the Securities and Exchange Commission and the Government to ". . . prosecute whenever possible Securities Act cases in the Southern District of New York . . ." which ". . . initiates a disrespect and flies in the face . . ." of the concern of this Court for the rights of defendants as laid down in *United States v. Johnson*, 323 U. S. 273, to ". . . 'the unfairness and hardship to which trial in an environment alien to the accused exposes him' . . ." (323 U. S. 275.) And also, ". . . leads to the appearance of abuses, if not abuse in the selection of what may deemed to be a tribunal favorable to the prosecution" (323 U. S. 275).

The following illustrates that there exists an apparent policy of the Securities and Exchange Commission and the Government to prosecute Securities Act violations in New York regardless of the facts of the case and circumstances of the individual defendant. The Twenty-Eighth Annual Report to Congress of the Securities and Exchange Commission for the Fiscal Year Ending June 30, 1962 Shows That As of June 30, 1962 There Were 140 Indictments Pending Involving 879 Persons. 39 of These (27.8%) and 371 Defend-

ants (41%) Were in the Southern District of New York.[2]

The 1962 Securities and Exchange Commission's annual report does not indicate if the defendants under indictment were local residents of the place indicted, however, a compilation of all indictments throughout the country for Securities Act violations[3] shows that at least 21%[4] were residents of other states. During the period of January 1, 1963 to November 1, 1963 a total of 33 indictments were returned out of 20 states. 6 of these indictments originated in New York, with a total of 28 defendants.

Conclusion.

In light of the petition pending before this Court and the statistics regarding the administration of justice and the prosecution of Security Act violations the Court should grant this petition for rehearing and the original Petition for Writ of Certiorari.

Respectfully submitted,

BURTON MARKS,
Attorney for Petitioner.

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[2] These figures vividly illustrate the widespread use of "shotgun" type of mass conspiracy indictments.

[3] Compiled from Securities and Exchange Commission's "Litigation Releases" January 1, 1963—November 1, 1963 (Litigation Releases numbers 2471-2775) ; of 88 individual and 14 corporate defendants, for a total of 102, 19 individual and 3 corporate defendants were non-residents.

[4] The 21% figure is incomplete since many "Litigation Releases", especially those from the Southern District of New York, failed to indicate the residence of the individual defendants.

Certificate of Counsel.

Burton Marks, being the counsel for petitioner herein, certifies to this court that the Petition for Rehearing is presented in good faith and not for the purposes of delay. Counsel further certifies to this Court that the Petition is restricted to the Grounds specified in the Petition for Rehearing, to wit, other Petitions for Writ of Certiorari, both granted and pending, are before this court and counsel did not know of this fact at the time of the filing of the original Petition for Certiorari.

Dated: December 6, 1962.

BURTON MARKS.